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8 Attorneys for Defendants  
 9 MARRIOTT INTERNATIONAL, INC.  
 (Erroneously sued herein as Marriott of San  
 10 Francisco) and SAM SNOWDEN

11  
 12 UNITED STATES DISTRICT COURT  
 13 NORTHERN DISTRICT OF CALIFORNIA

14 RICHARD E. WILMSHURST,

15 Plaintiff,

16 v.

17 MARRIOTT OF SAN FRANCISCO, SAM  
 18 SNOWDEN, IGNATIUS CHINN,  
 WILLIAM LOCKYER, BLAKE  
 GRAHAM, LEE CAREAGA, JOHN  
 MARSH, and KISU YO AND DOES 1  
 through 100,

19 Defendants.

20 Case No. C-07-03790 WHA

21 **NOTICE OF RECEIPT OF LATE  
 22 OPPOSITION, SUPPORTING  
 23 DECLARATION OF GAYLYNN KIRN  
 24 CONANT AND REPLY BRIEF IN  
 25 SUPPORT OF MOTION OF  
 26 DEFENDANTS MARRIOTT  
 27 INTERNATIONAL, INC. AND SAM  
 28 SNOWDEN TO DISMISS PURSUANT TO  
 FRCP 12(b)(5) AND FRCP 12(b)(6)**

Date: January 17, 2008  
 Time: 8:00 a.m.  
 Courtroom: 9  
 Judge: Hon. William H. Alsup

29 I. **NOTICE OF RECEIPT OF LATE OPPOSITION TO MOTIONS TO DISMISS OF**  
 30 **MARRIOTT INTERNATIONAL, INC. AND SAM SNOWDEN**

31 Although Plaintiff's Opposition to the Motions to Dismiss by Marriott International, Inc.  
 32 ("Marriott") and Sam Snowden ("Snowden") was due to be filed and served no later than  
 33 December 24, 2007 (December 21 for mail service) pursuant to Local Rules 5-5, 7-3, General  
 34 Order 45 and Federal Rule of Civil Procedure 6, defendants Marriott and Snowden received, via  
 35 U.S. Mail, Plaintiff's opposition on January 2, 2008 (See Exhibit A to Conant Declaration).  
 36 Moreover, although Mr. Wilmshurst's proof of service indicates the opposition was mail-served  
 37

1 on December 26, 2007 (five days late) (Exhibit B to Conant Declaration), the postmark on the  
 2 envelope shows the opposition was actually not mailed until December 31, 2007 (Exhibit C,  
 3 Conant Declaration), a week after the opposition filing deadline. A review of the Court's docket  
 4 the week of December 24 and again December 31, indicated no opposition to the motion had been  
 5 filed with the Court.

6 As Plaintiff failed to comply with the local rule and FRCP filing and service requirements  
 7 in connection with his opposition, Marriott and Snowden respectfully request that the Court grant  
 8 the pending motions to dismiss, in their entirety, without consideration of the late opposition.

9 In the event, the Court does consider Mr. Wilmshurst's late papers, Marriott and Snowden  
 10 submit their Reply Brief herein below, which is brief in light of the very short period of time in  
 11 which they have had to prepare said Reply.

12 **II. SUPPORTING DECLARATION OF GAYLYNN CONANT REGARDING LATE**  
**SERVICE OF PLAINTIFF'S OPPOSITION**

13 I, GayLynn Kirn Conant, declare as follows:

14 1. I am a partner at the law firm of Lombardi, Loper & Conant LLP, attorneys of  
 15 record for Defendants Sam Snowden and Marriott International, Inc. (erroneously sued herein as  
 16 Marriott of San Francisco). I have personal knowledge of all matters stated herein and could  
 17 competently testify thereto if called upon as a witness.

18 2. Attached hereto as Exhibit A is a true and correct copy of the face sheet of the  
 19 opposition brief served by Mr. Wilmshurst. In the regular course of business, our firm "date-  
 20 stamps" pleadings on the day it is physically received. As Exhibit A reflects, our firm received  
 21 Mr. Wilmshurst's opposition on January 2, 2008. I received nothing from Mr. Wilmshurst in  
 22 response to Marriott's and Snowden's motions to dismiss before January 2, 2007.

23 3. In reviewing Mr. Wilmshurst late papers, there is no explanation for the late filing  
 24 and service.

25 ///

26 ///

27 ///

1 I declare under penalty of perjury that the foregoing is true and correct. Executed this 3rd  
 2 day of January, 2008, at Oakland, California.

3 /s/ GayLynn Kirn Conant  
 4

5 **III. REPLY BRIEF IN SUPPORT OF MOTIONS TO DISMISS**

6 **A. No Good Cause Has Been Shown for the Failure to Properly Serve**  
 7 **Defendants Within 120 Days**

8 Mr. Wilmhurst's opposition spends considerable time debating whether or not he named  
 9 the appropriate Marriott entity in the instant lawsuit. This ignores the fact that Mr. Wilmhurst,  
 10 waited until the 11<sup>th</sup> hour to do anything to affect service of process and provides no reasonable  
 11 explanation for the delay. Nothing was apparently done to have Summons issued until late  
 12 October and then, on the last possible day, Marriott was served with an Order Setting New Case  
 13 Management Conference according to the information contained in the proof of service plaintiff  
 14 submits (See Exhibit D to Zacheo Declaration) which is consistent with the information  
 15 provided with the moving papers. The opposition also concedes that Mr. Snowden was not  
 16 served until November 20<sup>th</sup> and that the first attempt to personally serve Mr. Snowden personally  
 17 was not until November 19---well past the November 13, 2007 deadline. As Mr. Lockyer's  
 18 motion and the PACER Index establishes, Mr. Wilmhurst is a veteran litigator familiar with civil  
 19 procedure and the appropriate methods of service of process for corporations and individuals. No  
 20 good cause has been shown to extend the 120 day period and dismissal pursuant to FRCP 4 and  
 21 FRCP 5 is therefore appropriate.

22 **B. The Lawsuit Was Not Filed Within Two Years of the Allegedly Improper**  
 23 **Arrest and Search and is Therefore Time-Barred**

24 Without citation to authority, Mr. Wilmhurst claims "until the arrest is found to be  
 25 unlawful, a complaint based upon the unlawful incident cannot be made" and therefore his July  
 26 16, 2007 complaint was timely (because it was filed within two years of the date the charges were  
 27 dismissed). This issue was specifically addressed in the moving papers and Mr. Wilmhurst  
 28 provides no authority to distinguish *Wallace v. Kato*, 127 S.Ct. 1091, 1100 (2007) which holds

1 that the statute of limitations on a §1983 claim seeking damages for a false arrest accrues when  
 2 the claimant becomes detained—not when charges are later dropped or dismissed. As the  
 3 opposition concedes the arrest occurred on June 29, 2005 and that the complaint was not filed  
 4 until over two years later, the entire action should be dismissed as time-barred.

5 To the extent Mr. Wilmhurst is relying on the alternative negligence claim to pursue  
 6 damages against Mr. Snowden or Marriott, the claims are clearly barred by the two-year statute of  
 7 limitations set forth in California Code of Civil Procedure §335.1 as any conduct by Mr. Snowden  
 8 and/or Marriott that could conceivably give rise to a tort claim occurred on June 29, 2005—over  
 9 two years before Mr. Wilmhurst filed his lawsuit.

10 **C. Plaintiff Fails to Plead Facts Sufficient to State A Claim against Mr. Snowden**  
 11 **or Marriott**

12 Even assuming the Complaint was not time-barred, each of the theories asserted against  
 13 Marriott and Mr. Snowden fail to state a cause of action. Thus, Plaintiff's opposition does  
 14 nothing more than repeat the conclusory allegations of "conspiracy" and "negligence" in his  
 15 complaint and fails to offer new facts which could potentially cure the fatally defective complaint.  
 16 Although pro se pleadings are liberally interpreted, a liberal interpretation may not supply  
 17 essential elements of the claim that were not initially pled. *Ivivey v. Board of Regents of*  
*18 University of Alaska*, 673 F.2d 266, 268 (9<sup>th</sup> Cir. 1982). Here, Mr. Wilmhurst has provided the  
 19 Court with nothing to suggest any of the pleading deficiencies could be corrected with an  
 20 amended pleading. Consequently, the motion to dismiss should be granted without leave to  
 21 amend.

22 In connection with the civil rights violation claim(s), the opposition fails to address the  
 23 authorities in the moving papers which establish that the essential element of "action under color  
 24 of law" cannot be stated as to Marriott or Mr. Snowden. There are no facts suggesting that the  
 25 defendants were clothed with the authority of the state and were purporting to act under that  
 26 authority. *Sykes v. State of California*, 497 F.2d 197, 200 (9<sup>th</sup> Cir. 1974). The opposition makes  
 27 clear that at all times Mr. Wilmhurst recognized Mr. Snowden as a Marriott employee and there  
 28

1 is no suggestion that Mr. Snowden initiated, requested or affected an arrest of Mr. Wilmhurst. In  
 2 fact, Mr. Wilmhurst proclaims in his opposition that he was “singled out and searched by  
 3 Defendant Lockyer’s agents, based on bogus reasons that was beyond the scope of their authority.  
 4 [sic] And for no reason other than to harass.” There are no facts pled to suggest Mr. Snowden or  
 5 Marriott had anything to do with the foregoing alleged conduct.  
 6

7 Likewise, the fact that Mr. Snowden allegedly opened Mr. Wilmhurst’s hotel room  
 8 without a warrant is irrelevant (particularly in light of Mr. Wilmhurst’s probationary status and  
 9 the fact that Mr. Wilmhurst was present when access was granted). Mr. Wilmhurst provides the  
 10 court with absolutely no authority suggesting that a civil rights violation arises from a hotel  
 11 employee accessing a guest’s room under the circumstances presented by this case.  
 12

13 In addition, the only case cited in support of the “First Amendment” claim, *National*  
 14 *Association for Advancement of Colored People v. State of Alabama* (the correct citation is 357  
 15 U.S. 449) has nothing to do with the claims against Marriott or Mr. Snowden. The issue  
 16 presented was whether Alabama, consistently with the Due Process Clause of the Fourteenth  
 17 Amendment, could compel the NAACP to reveal to the State’s Attorney General the names and  
 18 addresses of all its Alabama members and agents, without regard to their positions or functions in  
 19 the Association. The Supreme Court held the underlying court order compelling disclosure  
 20 violated the right of free association and free speech assured to the NAACP and its members  
 21 under the Constitution. The case dealt with state action and there was no claim asserted against  
 22 private parties.  
 23

24 **D. CONCLUSION**

25 Plaintiff’s late opposition provides no new facts or legal authority to save his time-barred  
 26 and factually deficient lawsuit. Moreover, the opposition confirms Marriott and Mr. Snowden  
 27 were not properly served within 120 days and no good cause has been shown that could justify  
 28

1 the delay. As the court file and Mr. Wilmhurst's own pleading admissions establish, Mr.  
2 Wilmhurst filed his lawsuit late, had Summons issued late, made service attempts late and more  
3 recently, filed opposition to the instant motion late. Consequently, Marriott and Mr. Snowden  
4 respectfully request that their pending motions to dismiss, pursuant to FRCP 12(b)(5) and (6) be  
5 granted, in their entirety, without leave to amend.

6 Dated: January 3, 2008

LOMBARDI, LOPER & CONANT, LLP

7  
8 By: /s/ GayLynn Kirn Conant

9 GAYLYNN KIRN CONANT

10 Attorneys for Defendants

11 MARRIOTT INTERNATIONAL, INC.

12 (Erroneously sued herein as Marriott of  
13 San Francisco) and SAM SNOWDEN

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LOMBARDI, LOPER & CONANT, LLP  
Lake Merritt Plaza  
1999 Harrison Street, Suite 2600  
Oakland, CA 94612-3541

**EXHIBIT A**

1 RICHARD E. WILMSHURST, In Pro Per  
2 Post Office Box 33  
3 Angels Camp, California 95222  
Telephone: (209) 736-4566  
Facsimile: (209) 736-4569

RECEIVED

JAN 02 2008

LOMBARDI, LOPER & CONANT, LLP

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 RICHARD E. WILMSHURST,

Case No. C 07-03790 WHA

12 Plaintiff,

MEMORANDUM IN SUPPORT OF  
PLAINTIFF'S OPPOSITION TO  
DEFENDANT'S MOTION TO DISMISS  
DEFENDANTS MARRIOTT AND  
SNOWDEN FROM PLAINTIFF'S  
COMPLAINT; DECLARATION OF  
KAREN ZACCHEO; PROPOSED  
ORDER

13 v.

14 MARRIOTT OF SAN FRANCISCO,  
15 SAM SNOWDEN, IGNATIUS CHINN,  
16 WILLIAM LOCKYER, BLAKE  
17 GRAHAM, LEE CAREAGA, JOHN  
18 MARSH, and KISU YO AND DOES 1  
19 THROUGH 100,

Date: January 17, 2008  
Time: 8:00 a.m.  
Courtroom: 9  
Judge: Honorable William H. Alsup

20 Defendants.

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**EXHIBIT B**

**CERTIFICATE OF SERVICE**

I am a citizen of the United States and am employed in Stanislaus County. I am over the age of eighteen (18) years and not a party to this action; my business address is 1103 S. Main Street, Angels Camp, California 95222.

On December 26, 2007, I served the following documents: **MEMORANDUM IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS DEFENDANTS MARRIOTT INTERNATIONAL, INC. AND SAM SNOWDEN FROM PLAINTIFF'S COMPLAINT; DECLARATION OF KAREN ZACCHEO; PROPOSED ORDER** by placing a true copy thereof enclosed in a sealed envelope and served in the manner and /or manners described below to each of the parties herein and addressed as follows:

**GAYLYNN KIRN CONANT**  
LOMBARDI, LOPER & CONANT, LLP  
Lake Merritt Plaza  
1999 Harrison Street, Suite 2600  
Oakland, CA 94612-3541

Telephone: (510) 433-2600  
Fax: (510) 433-2699

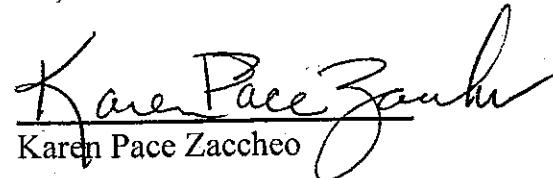
Attorneys for Defendants  
Marriott International, Inc. and  
Sam Snowden

X **BY MAIL:** I caused such envelope(s) to be deposited in the mail at my business address, addressed to the addressee(s) designated. I am readily familiar with RICHARD E. WILMSHURST practices for collection and processing of correspondence and pleadings for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business.

**BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the addressee(s) designated.

I declare under penalty of perjury under the laws of the State of California  
that the foregoing is true and correct.

Executed at Angels Camp, California, on December 26, 2007.

  
Karen Pace Zaccheo

**EXHIBIT C**



## FORTY-NINER

P.O. Box 49  
Angels Camp, California 95222

**First Class Mail**



Gaylynn Kinn Conant  
Lombardi, Loper & Conant, LLP  
Lake Merritt Plaza  
1999 Harrison Street, Suite 2600  
Oakland, CA 94612-3541

★ ★ ★  
UNITED STATES POSTAGE  
149 425 PB 8632425  
9160 02.260 DEC 31 07  
3571 ANGELS CAMP, CA 95222

**PROOF OF SERVICE**

Wilmshurst v. Marriott, et al.

USDC Northern District Case No. C-07-03790 WHA

I, Joni Gordon, hereby declare:

I am a citizen of the United States, over 18 years of age and not a party to the within action. I am employed in the county of Alameda; my business address is 1999 Harrison Street, Suite 2600, Oakland, CA 94612-3541.

I served the within:

**NOTICE OF RECEIPT OF LATE OPPOSITION, SUPPORTING DECLARATION OF  
GAYLYNN KIRN CONANT AND REPLY BRIEF IN SUPPORT OF MOTION OF  
DEFENDANTS MARRIOTT INTERNATIONAL, INC. AND SAM SNOWDEN TO  
DISMISS PURSUANT TO FRCP 12(b)(5) AND FRCP 12(b)(6)**

on all parties in this action, as addressed below, by causing a true copy thereof to be distributed as follows:

Richard E. Wilmshurst  
P.O. Box 33  
Angels Camp, CA 95222

**By United States Mail:** I enclosed the document in a sealed envelope or package addressed to the persons at the addresses listed above and placed the envelope/package for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing documents for mailing. On the same day that the document is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing an affidavit.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Oakland, California.

**By Fax Transmission:** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed above. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

**By Overnight Delivery:** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed above. I place the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

**By Personal Service:** I personally delivered the documents to the persons at the addresses listed above. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with the receptionist or an individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.

**By Messenger Service:** I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed above and providing them to a professional messenger service for service. *(A declaration by the messenger must accompany this Proof of Service.)*

1  
2 I declare under penalty of perjury under the laws of the State of California that the  
foregoing is true and correct.

3 Executed on January 3, 2008, at Oakland, California.

4   
5 Joni Gordon

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